BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES L. DINKEL Claimant	)	
VS.	)	
INLAND CONTAINER CORP. Respondent	)	Docket No. 177,409
AND	)	
HIGHLANDS INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 30, 2012, Post Award Medical Decision entered by Administrative Law Judge Pamela J. Fuller. This claim was placed on the Board's summary calendar for determination without oral argument. Claimant appeared pro se. Terry J. Malone, of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant is entitled to payment of claimant's medical bills for massage treatments received from March 24, 2010, through December 15, 2010. The ALJ denied claimant's request for repair or replacement of his hot tub, as well as claimant's request for medical mileage.

The Board has considered the record and adopted the stipulations listed in the Post Award Medical Decision.

ISSUES

Claimant argues that he is entitled to repair or replacement of his hot tub under the Workers Compensation Act. He also asserts he is entitled to medical mileage for trips he made to Dr. Gao for acupuncture treatments. Claimant contends that respondent's insurance carrier is interfering with his medical treatment.

Respondent asks the Board to affirm the ALJ's Post Award Medical Decision. Respondent argues that claimant failed to present evidence that a hot tub should be ordered as a medical necessity. Further, respondent asserts that claimant offered evidence through exhibits attached to his brief to the Board that are not part of the record.

The issue for the Board's review is: Is claimant entitled to repair or replacement of his hot tub and medical mileage?

FINDINGS OF FACT

Claimant was originally injured on July 28, 1992. He underwent several surgeries, all of which were unsuccessful. He was awarded a 50 percent permanent partial general disability on May 17, 1996. Claimant filed an Application for Review and Modification on January 22, 2004, and on October 29, 2004, the ALJ found him to be permanently, totally disabled.

After the May 17, 1996, Award, claimant filed nine applications for post award medical, none of which went to hearing. Then, on February 22, 2011, claimant filed another application for post award medical in which he sought payment of outstanding medical bills and medical mileage. On the application, claimant also stated, "Insurance lady is interfearing [*sic*] with my medical treatment!!"[1]

At the post award medical hearing, claimant submitted estimates from two businesses concerning the cost of repairing his current hot tub and the cost of replacing the hot tub. Claimant testified he had a doctor's order for a hot tub when he was first hurt. He said he went to the hospital and asked them to check for a copy of the doctor's order. It was unclear whether he found a copy of the doctor's order for a hot tub. None was made an exhibit at the post award medical hearing. Claimant testified he has purchased two hot tubs since his accident, both of which he paid for on his own. The hot tub he has now is leaking. Claimant said that on the advice of the attorney who was representing him at that time, he did not ask respondent to reimburse him for the cost of either of the hot tubs he bought on his own.

Claimant submitted a request for medical mileage reimbursement for the cost of trips from his home in Garden City to Wichita for acupuncture therapy for the period of May 1, 2009, through August 21, 2009. Claimant made the 428 mile round trip to Wichita 20 times during that period of time for a total of 8,560 miles. Plus he made one trip from Goddard, Kansas, to Wichita, which was a 60 mile round trip, making his total mileage 8,620 miles. The mileage rate for May 1, 2009, through June 30, 2009, was 50.5¢ per

[1] Form K-WC E-4, Application for Post Award Medical filed February 22, 2011.

mile. As of July 1, 2009, through June 30, 2010, the mileage rate was 55¢ per mile. Therefore, the mileage reimbursement for the 21 trips to Dr. Gao would be $4,603.48.[2]

Claimant testified he had been authorized to undergo acupuncture treatment, and he sought treatment from Dr. Gao in Wichita, Kansas, until Dr. Gao left for an extended visit in China. At some point, Rotanna Pinesett, a claims adjuster for Highlands Insurance Company (Highlands),[3] told claimant he could see one of two physicians from Garden City for acupuncture treatment. Claimant said he tried acupuncture treatment with one of those two physicians.

Ms. Pinesett testified that Highlands authorized claimant to receive 12 acupuncture treatments from Dr. Gao in 2009. Highlands also authorized the payment of medical mileage for those 12 treatments. On May 7, 2009, Ms. Pinesett sent claimant a letter which stated:

> You have already completed eight visits under the care of Dr. Gao, which leaves you with four remaining approved visits with Dr. Gao. Once you have completed the four remaining visits, please submit your request for mileage reimbursement to us.
>
> You can choose to continue your treatment with Dr. Gao and we will pay for his treatment at the previously agreed rate but we will no longer cover any travel expense including mileage.[4]

Claimant continued to see Dr. Gao until August 21, 2009. Ms. Pinesett said Highlands paid all the invoices for Dr. Gao's treatment, but only paid medical mileage for the originally-approved 12 treatments. The last mileage paid by Highlands was for the treatment claimant received from Dr. Gao on May 20, 2009.[5]

Ms. Pinesett said that after claimant's last treatment with Dr. Gao, Highlands paid for ten acupuncture treatments claimant had with Dr. Brent Haskell. Those treatments occurred in Garden City. Also, at the post award medical hearing, Ms. Pinesett said Highlands would reimburse claimant for the cost of massage treatments claimant received from Floating Cloud Salon from March 24, 2010, through December 15, 2010, although she said those massage treatments had not been authorized. Ms. Pinesett also said Highlands has been paying for claimant's chiropractic treatment with Dr. Jason Joy.

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[2] See K.S.A. 1992 Supp. 44-515(a).

[3] Ms. Pinesett has been the adjuster on claimant's claim since 2007.

[4] Pinesett Depo., Ex. 1.

[5] If the medical mileage from May 1, 2009, through May 20, 2009, is removed from claimant's request, it leaves mileage of 6,908 for the trips to Dr. Gao from May 26, 2009, through August 21, 2009.

Ms. Pinesett denied telling claimant's authorized physician, Dr. Bell Razafindrabe, that Highlands would no longer pay for chiropractic treatments, massage treatments or acupuncture treatments. She also denied telling Dr. James Britton's office that Highlands would not continue to pay for claimant's treatment because he had reached maximum medical improvement. She does not know how or why Dr. Britton's treatment of claimant ended. There was no testimony about when claimant was treated by Dr. Britton, but the independent medical examination report of Dr. Terrence Pratt of August 24, 2010, indicates he reviewed documents from Dr. Britton from October 15, 2009, through January 19, 2010.

Dr. Razafindrabe testified he was authorized to treat claimant. He first saw claimant on May 6, 2010. He said claimant presented with complaints of back pain. Dr. Razafindrabe treated claimant with a lumbar facet block and a program of home exercise. He also added oral medications to the program to help ease claimant's pain. Dr. Razafindrabe sees claimant on a monthly basis and plans to continue the same treatment program.

Dr. Razafindrabe testified that claimant asked for a prescription for a hot tub. But Dr. Razafindrabe said that it is "not a medical necessity" that claimant have a hot tub.[6] He said a hot tub would help claimant loosen up, especially in the morning, from arthritis pain but it is for comfort. It would not be a permanent treatment for claimant's pain.

Dr. Razafindrabe testified that claimant would benefit from massage from time to time but massage would not cure his chronic pain. Dr. Razafindrabe said claimant needs pain management on an ongoing basis that may include medications, pain modalities and injections if needed.

PRINCIPLES OF LAW

K.S.A. 1992 Supp. 44-510(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

[6] Razafindrabe Depo. at 5.

Case law interpreting the language, "as may be reasonably necessary to cure and relieve the employee from the effects of the injury" has found that it contemplates the employer being responsible for treatment which only relieves the employee's symptoms resulting from the injury.[7]

In *Hedrick*,[8] the Kansas Court of Appeals said that treatment was a "broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies."

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.[9]

K.S.A. 2011 Supp. 44-510k states in part:

> (a)(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury . . . .

K.A.R. 51-9-11 states in part:

> (a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.
>
> . . . .
>
> (c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.
>
> (d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be determined by a hearing before a workers compensation administrative law judge.

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[7] See *Carr v. Unit No. 8169/Midwestern Distribution*, 237 Kan. 660, 703 P.2d 751 (1985); *Harris v. Bechtel-Dempsey-Price*, 160 Kan. 560, 164 P.2d 89 (1945).

[8] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997).

[9] K.S.A. 1992 Supp. 44-501(a).

ANALYSIS

The documents and medical records attached to claimant's brief to the Board were never properly introduced into the record and, therefore, were not considered by the Board in this review.

Respondent informed claimant by letter that it would discontinue reimbursing claimant for his mileage for travel to appointments with Dr. Gao. However, respondent never deauthorized Dr. Gao or advised claimant that his treatment with Dr. Gao would not be covered. To the contrary, the same letter that said travel expenses would be cut off specifically said that any ongoing treatment with Dr. Gao would be paid by respondent. The two are not separable. If the treatment is authorized, then the travel is authorized. Respondent is responsible for reimbursing claimant for his mileage to and from his treatment with Dr. Gao.

Claimant seeks to have his hot tub repaired or replaced. Dr. Razafindrabe testified that the hot tub would help temporarily relieve claimant's pain. It is for comfort but is not a cure. The test for what is an appropriate medical treatment may be even broader post award under K.S.A. 2011 Supp. 44-510k than what it is pre-award under K.S.A. 1992 Supp. 44-510(a). This is because K.S.A. 1992 Supp. 44-510(a) requires treatment "as may be reasonably necessary to cure **and** relieve the employee from the effects of the injury"[10] whereas K.S.A. 2011 Supp. 510k(a), the post award medical statute, provides for payment of medical care that "is necessary to cure **or** relieve the effects of such injury."[11] Nevertheless, the record presented fails to prove that the hot tub is medically necessary or that it relieves claimant's symptoms any more than the other treatment modalities that claimant is receiving or, for that matter, any more than taking a hot bath.

CONCLUSION

(1) Claimant is entitled to reimbursement for round trip mileage for treatment with Dr. Gao in the amount of $4,603.48, minus any reimbursement amounts previously paid by respondent for the trips to Dr. Gao from May 1, 2009, through August 21, 2009.[12]

(2) Claimant is not entitled to the cost of repair or replacement of his hot tub as an authorized medical treatment expense.

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[10] K.S.A. 1992 Supp. 44-510(a) (Emphasis added).

[11] K.S.A. 2011 Supp. 44-510k (Emphasis added).

[12] Ms. Pinesett testified that respondent's insurance carrier has paid the mileage for the trips through May 20, 2009.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Decision of Administrative Law Judge Pamela J. Fuller dated January 30, 2012, is modified to award the requested mileage expense reimbursement but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: James L. Dinkel, Pro Se Claimant, 406 W. Emerson Ave., Garden City, Kansas, 67846
Terry J. Malone, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge